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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 571

LLOYD N. COBBLEDICK, Individually and as Vice-President of Cobbledick-Kibbe Glass Company, a Corporation, and COBBLEDICK-KIBBE GLASS COMPANY, a Corporation,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

No. 572

A. H. BRAWNER, Individually and as Officer and Director of W. P. FULLER & Co., a Corporation, and W. P. FULLER & Co., a Corporation,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

No. 573

EUGENE PALMUTH, Individually and as President of CROWE GLASS COMPANY, a Corporation, and CROWE GLASS COMPANY, a Corporation,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONERS

DONALD R. RICHBERG,
FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

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OPENING STATEMENT

The government brief presents a series of arguments intended to demonstrate that the final order from which

petitioners appealed *should not* be appealable. We submit that the only question here presented is whether the order of the District Court *is* a "final decision" within the meaning of Section 128 (a) of the Judicial Code. The arguments presented by the government to convince this Court that this particular kind of "final decision" should not be made appealable are arguments which can only be properly addressed to the Congress.

THE GOVERNMENT'S ARGUMENT

1. The Nature of the Proceedings in the District Court.

The government asserts that the motion of petitioners to quash the subpoenas did not begin an "independent proceeding" (which was then terminated by the denial of the motion by the District Court). The government contends that this motion to quash was an interlocutory step in a proceeding commenced by the *ex parte* application of the United States Attorney for the issuance of the subpoenas.

The fact is that the application for a subpoena is not the beginning of a legal proceeding. (*Perlman* v. *United States*, 247 U. S. 7, 12.) It is not an action against anyone or an action *in rem*. It is a process issued in aid of an investigation, which may be legislative, administrative or judicial. It may be issued in aid of judicial proceedings; but it has never been regarded as the beginning of a judicial proceeding. It is not a summons to answer a complaint. The witness is not made an adversary (the assumption being that he will not contest); and no judgment is sought against him.

An adversary proceeding that may result in a "final decision" *begins* when the motion is made to quash (exactly as such a proceeding begins with an applica-

tion for the return of records or for an injunction against their use). Such a proceeding *ends* with a final decision against or for the applicant. The order to produce records, or to return them, or to enjoin their use, is final and nothing remains except, in case of disobedience, to enforce it. For such enforcement execution is not appropriate, but the institution of a new contempt proceeding is available. But, when there is nothing left to be done in an adversary proceeding except to enforce "what has been determined" in the litigation, the decision which must be enforced by contempt proceedings is just as final as a decision which must be enforced by execution. (See *St. Louis etc. R. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, cited in the government brief at p. 11.)

It is, therefore, contrary to well established law to argue that the application for subpoenas "began" a litigation between the government and the prospective witnesses. But what real difference would it make if we indulged the government in its assumption that the present proceeding "began" with an *ex parte* application for an order directing that subpoenas be issued, and that, when the petitioners moved to quash the subpoenas it became an adversary proceeding which was finally decided by the denial of their motion? The application of the United States Attorney for the issuance of subpoenas was not made as a part of any pending proceeding. If this "began" a proceeding, it was an independent proceeding against the petitioners; so it is hard to see how it makes any difference whether it be argued that the present proceeding "began" with the application for subpoenas or "began" with the motion to quash. The vital question here is: Has the proceeding reached a final decision from which an appeal can be taken?

2. Was the Order of the District Court Interlocutory?

It cannot be denied that upon a refusal to quash the subpoenas each became effective against petitioners as an order to produce documentary evidence. If this order were disobeyed, the petitioners could not assert that the Court had not heard and passed upon their objections to it. They could not offer any reason for non-compliance except the reasons which they had had an opportunity to present and had presented to the Court, and which the Court had held invalid. On refusing to obey the order of the Court, they would be simply contumacious.

Therefore, the order denying the motion to quash was certainly final as to them; nnd since they were the only parties to the proceeding it could not be held interlocutory—or comparable with an order against a witness entered in the course of a litigation, involving him or other persons. Such a litigation, obviously, would not be finally decided by such an order. The present proceeding, however, reached a final decision with the order denying the motion to quash; and the sole basis for the government's argument that the order was interlocutory is the contention that if it were disobeyed, the petitioners would be able to appeal from the inevitable sentence for contempt.

Would it be suggested that a decree in equity requiring specific performance would not be a final decision; but that in order to appeal, the defendant must refuse to obey, be held in contempt, and then appeal from the sentence for contempt?

We submit that, when it is conceded that an order can be reviewed only by disobeying it, suffering punishment and appealing from the order of punishment, it has been thereby conceded that the order was a final

decision. It is a well established principle that in a contempt proceeding, the issue is only whether a valid order of the court has been violated. Of course, the jurisdiction of the court to enter an order, the utter invalidity of the order, may be a defense. But such an appeal provides a much more limited review of the order than would be obtained upon an appeal from the order itself.

In *Brougham* v. *Oceanic Steam Navigation Company*, 205 Fed. 857, 860, it was held:

> "Errors must be corrected by appeal and not by disobedience. A person proceeded against for disobeying an injunction can never set up as a defense that the court erred in issuing it. He must go further and make out that in the law there was no injunction because the court had no right to adjudicate."
>
> (Citing *Elliott* v. *Peirsol*, 1 Pet. 328.)

A long line of cases cited in 13 C.J. 15 (note 27) demonstrates that only a limited and wholly inadequate review of the order of the District Court would be available on appeal from a judgment for contempt. The finality of the decision on the motion to quash is painfully apparent to petitioners. The prospect of a later appeal is only a mirage. It offers no real promise of an ultimate protection of their rights.

Furthermore, it is well established, as pointed out in our petition, that such a contempt proceeding is not a litigation between parties before the court, but is a separate proceeding in behalf of the court. (See 13 C.J. 56, 57.) It is difficult to see by what logic a final decision can be called "interlocutory" merely because

another proceeding can be or must be brought to enforce the decision.

This court has held (in approving an opinion of Judge Van Devanter) that when it is necessary "to punish or to coerce" witnesses into compliance—

> "that will give rise to *another case* or cases to which the witnesses will be parties on the one hand, and the government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand". (Italics ours.)
>
> *Alexander* v. *United States*, 201 U. S. 117, 122.

The government assumes that there is some "pending litigation" in which the order appealed from is merely interlocutory. (Government Brief, pp. 14, 17.) The fact is that there is no pending litigation. There is pending only an investigation by a grand jury, which may or may not result in a litigation; but which cannot by any stretch of language be called a "pending litigation". It is definitely in point to quote again the holding of this Court in *Perlman* v. *United States*, 247 U. S. 7, 12, as follows:

> "The second contention of the government is somewhat strange; that is that the order granted upon its solicitation was not final as to Perlman, but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order, but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

The government inadvertently, but seriously, misquotes the foregoing ruling when it says the court stated that Perlman was "powerless to resist" (Gov-

ernment Brief, p. 22). The court said "powerless to *avert the mischief* of the order", which is exactly the dilemma of the petitioners here. If petitioners were allowed only a limited appeal, purchased at the price of being punished for contempt, they would certainly be "powerless to avert" a great deal of mischief.

The government retreats from its own position as to the interlocutory character of the order when it urges (Government Brief, page 18) that, according to our argument, a recalcitrant witness might appeal from an order to testify and then "if unsuccessful, might continue to refuse and then appeal from an order adjudging him in contempt." This is a fanciful argument because a witness against whom a subpoena had been sustained on appeal, would hardly subject himself to a heavy penalty for a subsequent inexcusable contempt in order that he might prosecute a fruitless appeal. However, the mere fact that another appeal may be possible later in another proceeding does not detract from the finality of a decision. The government is simply arguing that there should not be an appeal from one final decision because there *may be* another final decision in another proceeding through which petitioners *could seek* a belated and partial review of the final decision in the first proceeding.

In this connection we should again point out that in an appeal from a contempt adjudication the defendant could not obtain a complete review of the order which he disobeyed. That order, even though so erroneous as to warrant a reversal on direct appeal, would be held sufficient to support a sentence for contempt unless it could be shown that the order was absolutely invalid, because, for example, the court lacked jurisdiction. Thus, the argument of the government, that the decision here involved is not final because the issues "could

all be disposed of on the appeal from the final order adjudging the witness in contempt" (Government Brief, p. 18)—is insupportable. The defendants would not be permitted to raise all the issues on appeal from a contempt order that they would have a right to raise on appeal from the original order which *finally* disposed of these issues. (See authorities cited supra, p. 5.)

Furthermore, the individual officers, as defendants to contempt proceedings, being only custodians of the records, could not assert all the rights of the owner of the records, the corporation, under the doctrine approved most recently in *Zimmerman* v. *Wilson*, 105 F. (2nd), 583, where the opinion of the Court by Judge Biddle (the present Solicitor General) points out (P. 586) that "the owner alone can object and invoke the protection of the (Fourth) Amendment".

3. The Decisions Cited Support Petitioners.

The decisions cited by petitioners clearly support the decision of the Circuit Court of Appeals for the Second Circuit in *In re Cudahy Packing Company*, 104 F. (2d) 658, which is in direct conflict with the decision in the case at bar, as the government concedes. It is unnecessary to reargue the pertinence and logic of the cases cited.

4. The Corporate Appeals.

The government argues that the decision against the corporate petitioners is not final, although admitting that "no contempt proceedings could be prosecuted against the corporations as such because no subpoenas were ever issued to the corporations". (Government Brief, page 25.) The argument is made that "the corporate interests will be adequately protected when an

application is made to have the individual officers adjudged in contempt".

This argument is easily demonstrated to be wholly unsound. The object of the subpoenas is to obtain corporate records. The decision of the District Court denies to the corporations any right to withhold these records with a finality as to the corporations which is not disputed. (*Go-Bart Imp. Co.* v. *U. S.*, 282 U. S. 344, 357.) If contempt proceedings are brought against the individual officers, they cannot protect the corporate rights or obtain a review of the decision except by assuming the personal risk of a sentence for contempt. Why should they do this? It can be assumed that they have no personal interest to warrant subjecting themselves to contempt proceedings. It can be assumed they may decline to be contumacious. Then the corporations are denied any right to review a decision admittedly final against them.

Let us take a case where A has in custody records belonging to B in which A has no interest. B moves to quash the subpoenas issued against A. Perhaps A joins, or he may simply await the outcome of B's motion. B's motion is denied. Yet the government claims that B cannot protect his records except by inducing A to subject himself to contempt proceedings. Obviously, B has been denied a review of a final decision directly depriving him of his rights in respect to the records in question.

We submit that the government's effort to deny the clear right of the corporations to appeal from the final decision against them is wholly without merit. The government, by its attack on the "corporate fiction" is, in fact, seeking to destroy corporate rights, that is, the composite rights of the stockholders. These rights, according to the government's contention, can only be

asserted if corporate officers are willing to subject themselves to personal punishment in order to prosecute a limited appeal in behalf of the corporation which is denied the right of any appeal.

The final statement of the government (p. 26) that the corporations have no "legal standing to protest against the subpoenas which were not addressed to them", must be an inadvertent error. Certainly a corporation as a legal entity has rights and interests separate from those of its officers. This is made clear in the pertinent cases of *Webster Coal and C. Co.* v. *Cassatt*, 207 U. S. 181, 186, and *Zimmerman* v. *Wilson*, supra. This is peculiarly evident here where it is contended that an individual officer must risk personal punishment in order to preserve the right of the corporation to appeal. The precedents are clear that a person not subpoenaed can sue or intervene to prevent his records from being taken from another person. (*Newfield* v. *Ryan*, 91 F. (2nd) 700, 701). Such a litigant, whether an individual or a corporation, is not a "volunteer" but asserts the rights of the real party in interest. He has a "legal standing" even though subpoenas are not addressed to him. *Perlman* v. *United States*, supra, provides an example of such a suit.

It is respectfully submitted that the judgments in these cases should be reversed.

Respectfully submitted,

DONALD R. RICHBERG,
FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

Dated January 27, 1940.